

¹ K.S.A. 44-555c mandates that if a Board Member cannot hear a case then a pro-tem must be appointed as all awards must be heard and decided by five Board Members. A pro-tem was appointed October 25, 2010, to serve in this matter after former Board Member Carol Foreman retired. But due to a conflict the appointment was rescinded on October 27, 2010. Unfortunately, despite requests from the Board, another pro-tem was never appointed. Consequently, this case could not be placed in line for decision until the new Board Member was appointed and began work in February 2011.

impairment. The ALJ also determined that under K.S.A. 44-512b respondent owed claimant \$228.66 in interest for failing to pay compensation before the award.

Respondent maintains claimant failed to prove the extent of his functional impairment as claimant's medical expert, Dr. Edward Prostic, did not follow the AMA *Guides*.² Conversely, respondent contends its medical expert, Dr. Kenneth Gimple, established that claimant did not have the clinical findings needed to have a permanent impairment under the *Guides*. Consequently, respondent argues that claimant's requests for both permanent disability benefits and pre-award interest should be denied.

Claimant, on the other hand, argues Dr. Prostic's 10 percent whole person functional impairment rating is the only rating in the record based on the *Guides* and, as such, is uncontradicted. Accordingly, claimant asserts the ALJ rightly awarded him benefits for a 10 percent permanent partial general disability. In addition, claimant argues the ALJ appropriately awarded him pre-award interest under K.S.A. 44-512b as respondent lacked just cause for failing to pay permanent partial disability benefits. In short, claimant requests the Board to affirm the May 5, 2010, Award.

The only issues before the Board on this appeal are:

1. What impairment did claimant sustain as a result of his July 18, 2008, accident?
2. Did the ALJ err by assessing pre-award interest against respondent under K.S.A. 44-512b?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

On July 18, 2008, claimant injured his head, right hip, back, and elbow when a ladder broke causing him to fall several feet onto a concrete floor. At the regular hearing held before ALJ Sanders on February 4, 2010, the parties stipulated that claimant sustained a July 18, 2008, accident that was compensable under the Workers Compensation Act. At the hearing claimant's attorney also requested interest to be assessed against respondent as claimant had been rated by Dr. Edward J. Prostic as having a 10 percent whole person impairment and that was the only rating of which he was aware. Claimant's attorney then acknowledged that he did not know how Dr. Prostic had

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

arrived at the 10 percent whole person impairment rating but claimant's attorney assumed it represented a 5 percent whole person impairment to the thoracic spine and a 5 percent whole person impairment to the lower back.

At the regular hearing claimant testified his elbow symptoms and the numbness he had initially experienced in his legs had improved. He also testified he did not have any residual effects from his head injury. Both Drs. Gimple and Prostic noted that claimant did fracture the fourth lumbar vertebra in his spine which healed but claimant indicated he had ongoing symptoms in his back and right hip.

Claimant, whose job entails working on heating and air-conditioning systems in the shops and hangars at Forbes Air Base, was released by his treating physician, Dr. Kenneth Gimple, on April 8, 2009, to return to normal work without restrictions.³ The records respondent introduced at the regular hearing indicate that it paid claimant temporary partial disability benefits in the sum of \$402.36 for the period from July 23, 2008, through August 2, 2008, followed by \$12,719.34 in temporary total disability benefits for the period from August 3, 2008, through February 16, 2009.

Before the regular hearing, claimant's attorney requested respondent to pay the permanent disability compensation due claimant for a 10 percent whole person impairment as found by Dr. Prostic. Mr. Bryan's January 20, 2010, letter to Mr. Benedict reads:

Enclosed is another copy of the report of Dr. Prostic who has found a 10% impairment due to claimant's work injury.

This letter is a request [that] your client promptly pay the impairment found by the doctor now to avoid the imposition of K.S.A. 44-512b interest. This letter is a demand for payment as contemplated by K.S.A. 44-512b.

The information we have is the average weekly wage is \$674.38 with a TTD rate of \$449.61; 29.18 weeks of temporary disability benefits have been paid and the impairment found by the doctor is computed as: 430 weeks minus 29.18 weeks TTD paid = 400.82 x 10% = 40.08 weeks @ \$449.61 = \$18,020.37.

If our factual assumptions are incorrect, please make payment based upon a correct calculation based upon the factual assumptions as to temporary disability benefits, etc., that you believe correct.⁴

On January 22, 2010, Mr. Benedict responded to Mr. Bryan. Mr. Benedict stated that Dr. Prostic's 10 percent rating did not comply with the *Guides* and that claimant's

³ Gimple Depo., Ex. 4.

⁴ R.H. Trans., Cl. Ex. 2.

whole person impairment was, at best, 5 percent, and even that was questionable as claimant had returned to work without restrictions. Mr. Benedict further advised Mr. Bryan that respondent had requested a functional impairment rating, which would be shared when it arrived. In the May 5, 2010, Award, the ALJ determined the date of Mr. Benedict's letter, January 22, 2010, was the date interest should commence under K.S.A. 44-512b.

Claimant received only conservative medical treatment for his back injury. Dr. Gimple, an orthopedic surgeon, treated claimant from early August 2008 until April 8, 2009, when claimant was released without restrictions. But the doctor did advise claimant to exercise caution with his back.⁵ After being released, claimant attempted to return to Dr. Gimple but claimant was not allowed to see the doctor due to the medical release.⁶ According to the medical records entered into evidence, the doctor's final diagnosis was a back strain at the fourth lumbar vertebra from a fracture which had healed.

At Dr. Gimple's March 4, 2010, deposition, the doctor indicated he had not attempted to rate claimant and that he would not attempt to do so during the deposition.⁷ Accordingly, respondent offered three pages from the *Guides* and elicited testimony from the doctor that (1) claimant had experienced muscle guarding, which was not present when he was released, (2) the doctor did not document any neurological impairment at the time of claimant's release, (3) the doctor did not document any significant loss of structural integrity when claimant was released, (4) there was no significant loss of structural integrity on lateral flexion and extension x-rays, (5) claimant had no significant clinical findings when released, (6) claimant did not have a compressed vertebra, and (7) claimant did not have a posterior element fracture.

Respondent requests the Board to educe from Dr. Gimple's testimony and the three pages from the *Guides* that claimant did not sustain any functional impairment as a result of the July 2008 accident.

Claimant's medical expert, Dr. Prostic, was the only other doctor to testify in this claim. Dr. Prostic examined claimant in late August 2009 and testified on February 15, 2010. Claimant reported ongoing pain in the mid and low back and the doctor found the range of motion in claimant's back moderately restricted. Using the *Guides'* DRE tables, Dr. Prostic determined claimant had a 5 percent whole person impairment to the thoracic spine and a 5 percent whole person impairment to the lumbar spine, which comprised a 10 percent whole person impairment. The doctor acknowledged that the rating for claimant's thoracic spine was primarily based upon the fact that claimant had muscle guarding observed by a physician in the past.

⁵ Gimple Depo. at 5.

⁶ R.H. Trans. at 20.

⁷ Gimple Depo. at 7.

When an injury is not included in the schedule of K.S.A. 44-510d, permanent partial general disability is determined under K.S.A. 44-510e(a), which provides, in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of **permanent partial general disability shall** be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall **not be less than the percentage of functional impairment.** Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body **as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.** An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

The disability from claimant's back injury is governed by the above-quoted statute. Because claimant has returned to work for respondent presumably at his former wage, claimant's functional impairment determines his permanent disability rating.

K.S.A. 44-510e requires functional impairment to be determined by competent medical evidence. The Board declines respondent's invitation to take up the role of a medical expert, interpret claimant's medical history and clinical findings, and apply its medical expertise and interpretation of the *Guides* to assess claimant's functional impairment rating. The Board declines to do so on this occasion as Board decisions are based upon the evidence and record made in front of the ALJ. The respondent's arguments go to the weight to be accorded the testimony of Dr. Prostic but there is no other medical testimony in this case that challenges the doctor's method of rating the claimant pursuant to the *Guides*. The statute mandates that functional impairment be established by competent medical evidence and the Board will consider the expert medical rating opinion given by Dr. Prostic.

The Board finds the greater weight of the evidence establishes that claimant has ongoing symptoms in both his mid and lower back and that he has moderately restricted range of motion. And after considering and weighing the expert medical opinion presented in this claim, the Board affirms the ALJ's finding that claimant has sustained a 10 percent whole person impairment. The Board is not persuaded that Dr. Prostic's opinions

regarding claimant's functional impairment were refuted by respondent's interpretation of claimant's medical findings and the *Guides*.

Pursuant to K.S.A. 44-512b, the ALJ assessed pre-award interest against respondent for its failure to pay compensation before the award. That statute provides, in part:

Whenever the administrative law **judge or board finds**, upon a hearing conducted pursuant to K.S.A. 44-523 and amendments thereto or upon review or appeal of an award entered in such a hearing, **that there was not just cause or excuse for the failure** of the employer or insurance carrier **to pay, prior to an award, the compensation claimed to the person** entitled thereto, **the employee shall be entitled to interest** on the amount of the **disability compensation found to be due and unpaid** at the rate of interest prescribed pursuant to subsection (e)(1) of K.S.A. 16-204 and amendments thereto. Such interest shall be assessed against the employer or insurance carrier liable for the compensation and **shall accrue from the date such compensation was due.**⁸ (Emphasis added.)

As indicated above, the ALJ determined respondent's interest obligation commenced January 22, 2010. That is the date that respondent replied by letter to the claimant's demand that payment be made pursuant to Dr. Prostic's 10 percent rating. But in the January 22, 2010 letter the respondent's counsel replied that respondent had requested an impairment rating which would be shared as soon as received. Moreover, the respondent's terminal date did not expire until April 9, 2010. Consequently, it cannot be said that there was not just cause or excuse to pay prior to the award the compensation claimed by claimant as respondent arguably was seeking impairment ratings to refute Dr. Prostic's ratings. However, after the terminal date expired without any competent medical evidence to refute the only functional impairment rating in evidence, the respondent no longer had just cause or excuse for the failure to pay the functional impairment. Consequently, the Board concludes that claimant is entitled to interest on \$18,020.37 (which is the equivalent of a 10 percent permanent partial general disability) at the interest rate provided for in K.S.A. 16-204, as amended, from the date of the respondent's terminal date on April 9, 2010, until such time as respondent and its insurance carrier pay claimant those benefits.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁹ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

⁸ K.S.A. 44-512b(a).

⁹ K.S.A. 2009 Supp. 44-555c(k).

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated May 5, 2010, is modified to reflect that interest be assessed, as provided above, from the date of the respondent's terminal date on April 9, 2010, until such time as respondent and its insurance carrier pay claimant those benefits and affirmed in all other respects.

IT IS SO ORDERED.

Dated this 31st day of March, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Bryce D. Benedict, Attorney for Respondent and its Insurance Fund
Rebecca A. Sanders, Administrative Law Judge